

Executive Director:
Richard Bad Moccasin

Member Tribes:
Assiniboine & Sioux Tribes of Fort
Peck, Poplar, Montana

Blackfeet Tribe
Browning, Montana

Cheyenne River Sioux Tribe
Eagle Butte, South Dakota

Chippewa Cree Tribe
Box Elder, Montana

Crow Tribe
Crow Agency, Montana

Crow Creek Sioux Tribe
Fort Thompson, South Dakota

Eastern Shoshone Tribe
Fort Washakie, Wyoming

Flandreau Santee Sioux Tribe
Flandreau, South Dakota

Fort Belknap Tribes
Harlem, Montana

Kickapoo Tribe in Kansas
Horton, Kansas

Lower Brule Sioux Tribe
Lower Brule, South Dakota

Northern Arapaho Tribe
Fort Washakie, Wyoming

Northern Cheyenne Tribe
Lame Deer, Montana

Ogala Sioux Tribe
Pine Ridge, South Dakota

Omaha Tribe
Macy, Nebraska

Ponca Tribe of Nebraska
Niobrara, Nebraska

Prairie Band of Potawatomi
Mayetta, Kansas

Rosebud Sioux Tribe
Rosebud, South Dakota

Sac & Fox Nation of Missouri
Reserve, Kansas

Santee Sioux Tribe
Niobrara, Nebraska

Sisseton-Wahpeton Sioux Tribe
Agency Village, South Dakota

Spirit Lake Tribe
Fort Totten, North Dakota

Standing Rock Sioux Tribe
Fort Yates, North Dakota

Three Affiliated Tribes
New Town, North Dakota

Turtle Mt. Band of Chippewa
Bekcourt, North Dakota

Winnebago Tribe of Nebraska
Winnebago, Nebraska

Yankton Sioux Tribe
Marty, South Dakota

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Mni Sose Intertribal Water Rights Coalition's
Role in the Management of the Missouri River

Presentation by

Richard Bad Moccasin, M.P.H.

Executive Director

Background Information

The protection and management of tribal water and land resources in the Missouri River watershed are among the most critical priorities facing the 28 basin Tribes. Indian Tribes control more than 15 million acres of land within the watershed, geographically distributed from the headwaters in Montana to the mouth of the Missouri River in Kansas and Missouri. These reservations were set aside for use and development as permanent tribal homelands.

Despite historical and legal rights to the water, the 27 Coalition Member Tribes have not participated fully in the benefits of the Missouri River water resources and its tributaries. Three hundred-fifty thousand acres of land, or twenty-three percent of the 1,499,759 acres taken for the construction of the dams and reservoirs under the Pick-Sloan plan, were lands of the Tribes. Although the federal government promised irrigation development and participation in the electricity generation, the Tribes have not received these benefits.

A survey conducted by the Mni Sose Coalition reported an average education level of a high school diploma for adult tribal members among the Missouri River Basin Tribes, which results in a lack of trained tribal professionals and technicians. Scarce resources are reflected in an annual average unemployment rate of 50 percent among the Missouri River Basin Tribes. The Cheyenne River Sioux Tribe and the Rosebud Sioux Tribe report unemployment rates near 85 percent.

Tribal leaders are seeking legal, administrative, economic, and physical control over their significant water resources as a means to achieve sustainable reservation economy, cultural well-being, and sovereignty of tribal people in the watershed. The Mni Sose Intertribal Water Rights Coalition was formed as the mechanism to pursue these goals. The Great Northern Plains Tribes originally envisioned the concept of a water resource

consortium as early as 1973. In January of 1993, they formally organized and recognized the Mni Sose Intertribal Water Rights Coalition.

The Coalition was established as a nonprofit organization:

- to promote the health, education, welfare, and economic growth throughout the lands of the member Tribes, Bands, Communities, and Nations through the development, assertion, enhancement, and protection of their water rights;
- to plan, coordinate, and prepare educational materials and training events to help the member Tribes in the development, assertion, enhancement, and protection of their water rights; and
- to obtain the human and fiscal resources necessary to accomplish the corporate purposes.

The Coalition's objectives are to strengthen tribal capabilities to manage, control, and protect tribal water resources pursuant to tribal goals and values as defined by tribal law. In addition, the Coalition seeks to enhance tribal capabilities to implement environmental programs pursuant to federal law. The major efforts of the Coalition are the development of the technical capabilities, programs, and infrastructure to address tribal water resource issues; development of cooperative communications network systems that assist in the resolution of water rights issues; and documentation of water resource technology and management techniques.

For decades, inadequate financial resources have prevented the control, management, use, and jurisdiction by the Tribes over their water resources in the Missouri River Basin. This results in inadequate consideration of tribal legal entitlement to water. Inappropriate social, governmental, economic, and organizational mechanisms at the tribal, federal, and state levels result in the failure to incorporate tribal input in policy formation. Furthermore, the Tribes have not had the opportunity to participate in the social and economic development process for the management of the Missouri River. Yet, control over the water resources in the Missouri River Basin is central to the sovereignty and self-determination of the Tribes. It is a key to their survival, economic prosperity, cultural strength, and development.

The Tribes have great diversity in water resource management skills and expertise. Each Tribe has particular water resource issues existing on its reservation. Although each Tribe has specific areas of concern, they realize that legal and regulatory actions by other agencies may set precedents and binding decisions that affect all Basin Tribes. The Tribes are aware that they must act in concert to address these issues to assure that present actions or inactions of an individual Tribe do not constrain tribal alternatives in water resource management.

At the core of the tribal concerns is the maintenance of a coordinated approach to problem-solving resulting in an informed tribal response to issues based on science and policy.

The Tribes have identified the following specific problems confronting the Coalition as it addresses the myriad of water rights issues in the Missouri River Basin:

- 1. The Mni Sose Intertribal Water Rights Coalition has identified the lack of Indian participation in the management of the Missouri River water system as a major issue.**

Both the Army Corps of Engineers and state governments have ignored tribal and Indian water rights in the management of the Missouri River. In the Mni Sose Intertribal Water Rights Coalition's response to the Army Corps' Master Water Control Manual Draft Environmental Impact Statement, the Coalition noted that the ACOE is considering only existing consumptive uses; no potential tribal water rights are considered in the operation models.

In addition, the states have also threatened Indian water rights by invoking the McCarran Amendment. Tribal intergovernmental relations are tribal/federal relations, not tribal/state. However, when Congress waived the sovereign immunity of the United States in water rights adjudications under the McCarran Amendment, the U.S. Supreme Court allowed adjudication of Indian water rights, some of the most valuable treaty rights of the Tribes, in state courts. State governments, typically representing non-Indian water users

in competition for Indian water, exert strong influences rendering no fair or meaningful state forum in which to address Indian water issues.

In the 1940s and 50s, the federal government constructed massive water facilities including dams, hydroelectric facilities, canals, navigation structure, and flood control features on or next to most of the Indian reservations. Tribal people still remember watching in horror as communities, prime bottom lands, riparian areas, forests, and grave sites were inundated by the construction of these facilities and the water siphoned away from the Reservations. While the federal and state governments conveniently ignored the tribal rights to water, benefits of these projects were siphoned to non-Indian communities.

Missouri River Basin Tribes emerged from the struggles with forced reservation life. They stand to regain control over tribal water resources, rehabilitate the lands and resources that negatively impacted by events in the 1940s and 50s and to actively participate in the prudent management of the Missouri River water resource.

The Missouri River Basin Tribes must participate in important water resource development programs and in other water resource activities to fully utilize and secure the benefits to tribal members. The Missouri River Basin is beginning a period of accelerated water development and increased water regulation. The ACOE is attempting to complete the Master Water Control

Manual for the Missouri River System, and Western Area Power Administration (WAPA) is completing a new power allocation process, which will be available on January 1, 2001. The Tribes must take advantage of this window of opportunity. If the opportunities (i.e., WAPA, Missouri River Master Water Control Manual development, refurbishment and refinement of Missouri River hydropower facilities) are not addressed by the Coalition Tribes, similar opportunities may not arise for decades. The Tribes will be prevented from addressing the tribal water resource options and alternatives because of a lack of access.

The Tribes seek to have meaningful participation in the resource management of the Missouri River Basin based upon principles of fairness and science and not politics and expediency.

2. The Missouri River Basin Tribes lack the technology and technical skills to participate, on a meaningful level, with state and federal agencies in the management of the Missouri River Basin.

A broad-scale and cooperative tribal resource management effort is needed to insure effective tribal participation in water resource management and development. The Missouri River Basin Tribes must compete with the Army Corps of Engineers, seven state water resource departments, and other federal/state agencies. The Coalition Tribes must contest water issues with huge federal agencies and state agencies possessing vast fiscal and human

resources. Federal and state agencies use statistical techniques that do not take into account factors specific to Tribes. For example, in measuring the cost of hydropower, the lost opportunity to Tribes is not included as part of the cost.

With specific reference to the water resource, the Coalition Tribes will need to cooperate and collaborate among themselves to decide and identify alternatives regarding water resource management. Individual Tribes, especially smaller Tribes, lack the necessary fiscal resources to employ technicians and professional hydrologists to collect, analyze, and interpret data in Indian water rights issues. They need experienced professionals to advise tribal leaders and their staff on the development and management of agricultural lands and systems. These professionals are necessary to track and calculate tribal water entitlements; inventory, assess, and remediate environmental problems; evaluate and protect community health; market and develop tribal water resources; and operate tribal drinking water and waste water facilities.

- 3. Even if federal agencies would like to involve Tribes as cooperating agencies in the management of the Missouri River, Tribes lack the resources to collect and analyze the data before making their recommendations.**

The Missouri River Basin tribal natural resources and water resource offices depend on discretionary funding from federal agencies for maintenance of their operations. They derive the bulk of this funding from the Bureau of Indian Affairs and other governmental agencies, with annual funding priorities mandated by Congress. The Tribes are vulnerable to the annual fluctuations in Federal funding, which inhibit long-term planning. The agencies have neglected the smaller Tribes as to funding, training, technical assistance, and Federal outreach.

In a survey conducted by the Mni Sose Intertribal Water Rights Coalition, the individual tribal water resource offices reported they were under-manned by an average of three full-time staff members. The Tribes indicated that these positions were needed in water inventory maintenance.

New Federal requirements for drinking water protection, solid waste control, non-point source pollution abatement, and hazardous waste have affected Indian reservations. Tribes have been charged with implementing these legislative regulations and rules with inadequate federal funding. The Tribes must take the lead in the development of these codes and regulations or be subjected to state-imposed codes. Tribes need critical skills to carry out these programs pursuant to current and additional federal laws. Such skills include sound technical capabilities and administration, policy, and managerial skills.

4. The Missouri River Basin Tribes, individually, have been unable to address water rights issues due to the Federal agencies' complex infrastructure, geographical isolation, and lack of technical skills and technology.

The current legal environment for the resolution of tribal rights to the Missouri system and its tributaries is highly charged, competitive, and fast moving. Many tribal leaders perceive the legal system to be extremely threatening to tribal sovereignty.

For 20 years, the U.S. Department of the Interior has held a moratorium on the approval of tribal water codes. Efforts by tribal governments to self-govern their resources have largely been stifled. Mni Sose has been at the forefront of efforts to overturn that blockade to infrastructure development. Mni Sose has prepared a program for the development of model tribal water codes, which will allow any Tribe to adopt individually tailored laws governing the resources of the Tribe. Such a model code will save each Tribe tens of thousands of dollars in the development of their water laws.

Concurrently, the Coalition is working with the U.S. Department of Justice in the development of an enforcement program to back the adoption of the water codes. Without local enforcement, any attempt to regulate water use and abuse will be met with frustration.

Some states have adopted laws to quantify Indian water rights. This has forced Tribes to negotiate with states to identify quantities of Indian water. Again, the control and knowledge of the resource base and the presence of tribal water management capabilities can exert a profound influence on the positive or negative outcome of a negotiated settlement. In any case, as more states move to quantify tribal water using the state court proceedings or negotiations, many Tribes are seeking to develop their technical knowledge and skills in water resource management.

Coalition Tribes are striving to exert an active water resource management presence and improve technical capabilities in water resource development. This will reduce or eliminate the need for state and federal control of tribal resources. The Tribes would like the opportunity to develop their homelands, devising resource use and management strategies that would fit within the framework of state, Federal, and tribal laws, eliminating the need for costly litigation.

The original motivating factor that formed the Mni Sose Coalition was the collective and basin-wide concern of the Tribes over the quantification of tribal water rights. Not including any legal or negotiated proceeding, nearly all of the 28 basin Tribes are involved in some aspect of water rights development. The identification, development, management, and protection of water rights are underway. All Tribes are at different stages with respect to water quantification, water resource development, and control structure. The

profound realization that tribal water rights exist even without formal adjudication has prompted many Tribes to seek ways of securing increased control over the resource through tribal resource management activities, including resource policy development.

Tribal lands are located in isolated, rural areas with limited access to current resource technology, expertise, and equipment. The smaller Tribes have not been able to keep pace with technology (i.e., computerized water monitoring systems), and as a result, are unable to fully assess their water resources and tribal options in water management due to lack of financial resources. Even those Tribes with some financial resources have inadequate resources to cover their million-acre plus reservation lands. Access by computer to data and expertise is an effective way to address this need.

The basis for securing the greatest amount of control over water resources, with the greatest flexibility in use over the long term, consists of three components:

- Accurate and comprehensive technical information regarding tribal resources;
- Capable and competent tribal water resource managers; and
- Strong tribal government with effective resource-governing policies.

These aspects, essential for tribal self-determination, are often overlooked in both settlement and litigation arenas. The Mni Sose Coalition has focused on

these key areas in developing tribal capabilities. The Coalition believes these needs exist, no matter the litigation, negotiation, or other paths taken by the member Tribes in the resolution of water resource issues.

Conflicts in the Current Management of the Missouri River

The rights of the Indian Tribes were not taken into account in the development of the Missouri River dams. This continues in the operation of these projects by the Corps of Engineers.

The primary theme among the Indian Nations of the Missouri River basin for sustainable economic and social development remains the fact that the Tribes contributed economic resources for the Pick-Sloan project, but they are receiving few of the benefits. Accordingly, the Mni Sose Intertribal Water Rights Coalition is working toward revisions in the operation of the Pick-Sloan project by the Corps of Engineers to protect the environmental and cultural resources of the Missouri River basin and to ensure that the Tribes receive some of the benefits of the projects for which they have suffered so dearly.

Ironically, the current debate about the distribution of Pick-Sloan's benefits is dominated by those who already benefit but want more. The states of South Dakota and Missouri continue to bicker about water flows, with South

Dakota wanting higher reservoir levels for recreation development upstream, while Missouri seeks continued releases of water to support its navigation industry. Both South Dakota and Missouri have filed lawsuits in recent years against the Corps of Engineers, advocating their respective positions in federal court.

Meanwhile, the Corps of Engineers has estimated that its operation of the Missouri River dams contributes \$1.3 billion to the national economy annually. Of that figure, one-half is derived from the sale of hydroelectricity by the Department of Energy. The remaining contribution comes in the form of navigation benefits, flood control benefits, and recreation development.

Yet the Tribes share little of these revenues. In fact, reservoir level fluctuations impact tribal environment and wildlife habitats, and native burial grounds and ceremonial sites are subject to erosion and inundation. Today, the United States continues to confiscate Indian property rights for the benefit of the national economy, while the native people often live in third-world conditions.

Sustainable Alternatives

Mni Sose and the Tribes of the Missouri River Basin have focused on several activities to support the development of sustainable programs for economic and cultural development. These programs are intended to prepare the Tribes for self-governance and self-directed development of the reservation

infrastructure necessary for the long-term health and viability of the reservations.

Significant progress has been made in tribal efforts to receive a direct allocation of the hydroelectricity generated by the dams on the Missouri River and its tributaries. Mni Sose has sponsored a series of meetings and educational seminars to assure that the Tribes will be "ready, willing, and able" to receive an allocation of power in the year 2001. With a proposed 70 percent allocation, it is estimated that the Cheyenne River Sioux, Lower Brule Sioux, Rosebud Sioux, and Oglala Sioux Tribes would collectively achieve annual savings of \$1,780,000 for their members, a significant accomplishment in a region where the average household income is \$8,500 (1990 U.S. Census - Indians on Trust lands), or 31 percent of the north-centrals non-Indian annual income of \$27,000.

Mni Sose is laying the groundwork for the purchase of irrigation and electrical generation facilities from the U.S. Bureau of Reclamation. As the U.S. government sells off assets developed over the last century, Indian Tribes are in position to assume ownership and control of those facilities, which have traditionally utilized tribal assets, including water rights.

Mni Sose has been engaged in a constant effort to educate the various U.S. agencies and Congressional committees of the treaty and trust responsibilities of the Federal government. The Coalition has worked successfully for

inclusion of acknowledgments of tribal water rights in the Army Corps of Engineers' Master Manual for the management of the Missouri River, guidelines for sale of federal assets by the Bureau of Reclamation, and the program for reallocation of hydroelectric power by the Department of Energy.

In joint cooperation with the U.S. Indian Health Service and the U.S. Environmental Protection Agency, Mni Sose is working on a program to address non-point source pollution on the reservations. This program again works on the theory that a core program for infrastructure development will result in substantial savings to the government and individual Tribes. Focused on community awareness and education, this program will initially act to reduce contamination of the water sources in the primarily agrarian communities of the reservations. The long-term consequences of the program will be the development of tribally run water management programs. This will afford a Tribe the opportunity for the economic development of its water resources.

Conclusion

The Indian Nations of the Missouri River basin possess extensive land and water rights, which will enable them to be self-sufficient and to control their destiny. Yet tribal land and water have been developed by various agencies of the United States government for the benefit of others. Meanwhile, tribal development efforts are hampered by inadequate environmental

infrastructure. This seriously threatens public health on Indian Reservations, as well. Yet neither the Congress, U.S. Public Health Service, nor the environmental movement has given serious consideration to these threats.

There can be no meaningful development without improved infrastructures. Consequently, the improvement of water, sanitation, and solid waste facilities of Indian Reservations remains a foremost concern of the tribal leadership.

Moreover, the Indian Nations of the Missouri River basin are telling the United States to stop using tribal land and water for hydroelectricity, navigation traffic, and irrigation by the homesteaders unless the Tribes are adequately compensated for the use and degradation of these resources. In addition, the federal government is using tribal resources in a manner that destroys wildlife habitats and environmental and cultural resources. There can be no sustainable development unless these resources are preserved and enhanced.

Ultimately, the approach of the larger non-Indian society toward the Indian rights and treaties must change dramatically. Instead, Tribes are perceived as an inconvenience as the federal government and non-Indian society take and utilize tribal land and water for their economic benefit. Mni Sose will continue to exhibit the patience and perseverance of tribal ancestors in asserting these rights. By continuing to emphasize treaty rights to land and

water, Mni Sose shall undertake sustainable development and create the permanent homelands that are guaranteed in the treaties themselves.

Finally, the Coalition is accomplishing what has historically been an impossible goal: bringing together the competing interests of the Missouri River Basin. The voice of 27 Indian Nations speaking with one voice is loud enough for the federal and state agencies to hear. The message is primarily technical and legal, maintaining its credibility.

All of the activities of the Coalition are directed from the communities of our member reservations. Therefore, all of our programs have a direct impact on the long-term quality of life in those communities. The Coalition addresses those issues of basin-wide importance expressing the voice of those communities. The thoughtful and directed efforts of Mni Sose are gathering strength as we work toward greater self-governance and sustainable economies for the Native American Tribes.